1998

James K. Rawson and Rebecca R. Rawson v. Kim Edward Conover and Karen Jane Conover : Response to Petition for Rehearing

Utah Court of Appeals

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JAMES K. RAWSON, Trustee, and REBECCA R. RAWSON, Trustee, Plaintiffs-Appellants, vs. KIM EDWARD CONOVER and KAREN JANE CONOVER, a Utah General Partnership, dba K&K SALES; KIM EDWARD CONOVER, dba K&K SALES; K&K SALES, INC., a corporation; KIM EDWARD CONOVER, dba K&K SALES, INC.; PAUL W. CLARK; and OLD REPUBLIC SURETY CO., a corporation, Defendants-Appellees.	50 .A10 DOCKET NO. 980298CA Case No. 980298 CA ARGUMENT PRIORITY 15

APPELLEES' RESPONSE TO POINT I OF PETITION FOR REHEARING

APPEAL FROM A FINAL CIVIL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

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IN THE UTAH COURT OF APPEALS

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APPELLEES' RESPONSE TO POINT I OF PETITION FOR REHEARING

Pursuant to the Corrected Order issued by this Court on August 27, 1999, Appellees (hereafter collectively "Defendants") hereby submit the following Response to Appellants' Petition for Rehearing (hereafter the "Petition"), limited to the arguments set forth in Point I of said Petition.

SUMMARY OF ARGUMENT

Through their Petition for Rehearing, Appellants are attempting to gain a sixth opportunity to argue the merits of what has already been determined to be meritless claims against the Defendants. The first judicial forum was held when Judge Brian was presented with

Defendants' first Motion for Summary Judgement. (R. 163-165) and Rawsons' contrary arguments (R. 214-242). Because Rawsons submitted no evidence substantiating any intent of Defendants to defraud Rawsons, and no law placing a strict liability standard on the seller of a motor vehicle, Judge Brian dismissed the fraud claim (as well as several other claims without factual support). (R. 274). After Judge Brian made his ruling, Rawsons filed an objection to the proposed Order, directing all of its arguments to the content of the Court's ruling rather than its form. (R. 275-283). This second forum also resulted in a negative result for Rawsons when Judge Brian entered the Order as presented by Defendants. (R. 287-289).

The third opportunity was presented with Defendants' second Motion for Summary Judgment, based on the subsequent deposition testimony of Rawsons admitting the lack of reliance on any warranties and acknowledging their understanding of the waiver of warranties they had executed. (R. 341-343). Although Rawsons again attempted to argue all of their claims (R. 272-402), Judge Iwasaki correctly refused to reconsider Judge Brian's Order *sua sponte*, and agreed with the reasonableness of Defendants' waiver of warranties. (R. 413). For a fourth time Rawsons attempted to reargue the entire matter by objecting to the form of the Order submitted by Defendants. (R. 417-420). Judge Iwasaki properly entered an Order dismissing the remaining claims for breach of warranty and contract. (R. 423-425).

In the appeal before this Court, Rawsons took their fifth opportunity to assert a factual and legal basis for fraud against Defendants and an attack on the unambiguous statutory waiver of warranty. This Court affirmed the District Courts' rulings for the same reasons. By their Petition for Rehearing, Rawsons are again attempting, for the sixth time, to state a claim without credible and timely evidence and without legally supportable theories.

ARGUMENT

Initially, through Point I of the Petition, Appellants (hereinafter collectively "Rawsons") seem to assert that they had in fact alleged with sufficient particularity a claim of fraud against the Defendants, and had supported that claim by admissible evidence timely offered in opposition to Defendants' first Motion for Summary Judgment. That assertion directly contradicts the express finding No. 2 of Judge Brian's Order of October 4, 1996, dismissing the fraud claim for lack of any supportive evidence. Thereafter, Rawsons attempt to use the unsubstantiated and dismissed fraud claim as a bootstrap to gut the clearly written waivers of warranty, signed and acknowledged by Rawsons, of their intended effect. In doing so, Rawsons complain of the incorrectness of Judge Iwasaki's Order dated May 28, 1998. An additional assault on Judge Iwasaki's Order is the result of the Rawsons' perceived injustice resulting from the Judge's failure to reconsider Judge Brian's prior Order dismissing the fraud claim. Each of these issues will be dealt with separately in this Response.

1. Judge Brian properly dismissed the fraud claim.

As Count I of their Amended Complaint, Rawsons asserted a claim against the Defendants for an "Intent to Defraud," alleging that Defendants sold the subject vehicle in a defective condition to the Rawsons, "knowingly, purposefully, willfully, maliciously and with the intent to defraud plaintiffs . . .." (Amended Complaint, R. 102). Count II, titled "Tortious Misrepresentations" alleged a claim for odometer fraud, which claim was later dismissed with prejudice by stipulation. (Order, R. 158-159). No specific fraudulent representation is identified in either the Amended Complaint or Rawsons' Memorandum in Opposition to the Defendants' Summary Judgment Motion as having been the offensive utterance.

In their Memorandum of Points and Authorities in support of their initial Motion for Summary Judgment, Defendants reminded Rawsons that the essential elements of a fraud claim include the existence of "a false misrepresentation made by Defendants concerning a material fact **which was either known by Defendants to have been false or was made recklessly, knowing that they had insufficient knowledge upon which to base that representation.** *Marchese v. Nelson*, 809 F. Supp. 880, 890 (D. Utah 1993), citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991)." (Memorandum, R. 177).

Rawsons' responding Memorandum in Opposition to Defendants' Motion was absolutely silent on any issue concerning (1) the identification of any **fraudulent** misrepresentation and (2) the intent of any of the Defendants to mislead or defraud Rawsons. Instead, Rawsons focused all of the substantive argument in that Memorandum on their assertion of Defendants' alleged liability for "Breach of Warranty" under the Utah Commercial Code. (Memorandum, pages 8-18, R. 221-231). They claimed, without any citation to legal authority, that a seller of a motor vehicle "had an affirmative duty to discover and disclose to their customers all relevant facts concerning the physical condition (including significant and improperly repaired collision damage) of motor vehicles they sell . . .." (Memorandum, page 6, ¶ 17, R. 219). At no place in the entire Memorandum are the words "fraudulent", "reckless" or "intentional misrepresentation" to be found.

Rawsons' unsupported legal assertion that an owner of a motor vehicle has an increased burden of discovery has made its way into Appellants' Petition at page 3: " . . . in light of the owner/dealer's duty to discover the truth . . .." Notwithstanding Judge Brian's early request that respective counsel do so, neither Rawsons nor Defendants have been able to find any law

supporting this persistent assertion of Rawsons. Rawsons' citation of *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980) offers absolutely no assistance to the present matter as the factual circumstances are so different as to make the cases mutually irrelevant. In *Dugan*, the Court held that **in the particular area of real property**, an "owner is presumed to know the boundaries of his own land, the quantity of acreage and the amount of water available." 615 P.2d at 1246. Those qualities, unique to real estate, are permanent and unchangeable. The mere ownership and possession of land will normally impute the basic knowledge of those facts. There is no reference or implication in *Dugan*, nor in any discovered case since then, of a similar presumption of increased knowledge of latent defects placed upon the owner of a motor vehicle or any other item of tangible depreciating personal property. That argument particularly falls apart when the legal owner of the motor vehicle does not enjoy substantial actual use of the vehicle.

Now, in their Petition, Rawsons take an additional unsupportable leap of logic in declaring that the Affidavits submitted in opposition to Defendants' first Motion for Summary Judgment, somehow evidenced Defendants' "knowledge" that the vehicle was inadequately repaired. (Petition at pages 3, 4, and 5). There was not then nor has there ever been any evidence of any nature which implicated either of the Defendants with any knowledge of defective repair work. In their Petition, Rawsons fail to identify any evidence of Defendants' prior knowledge of defects. That is a fatal failure of Rawsons to marshal such evidence in order to successfully challenge the Court's finding. *Reid v. Mutual of Omaha Ins. Co.,* 776 P.2d 896, 899 (Utah 1989). A close analysis of what Rawsons do cite, however, is instructive as to the legitimacy of their Petition.

The first factual "authority" upon which Rawsons rely in their recent assertion of Defendants' culpability for an intentional misrepresentation is a statement attributed to Jack Lambrose, one of the professional repairmen who worked on the subject vehicle prior to its sale to Rawsons. It is important to note that no quote of Mr. Lambrose is included in the Petition. Rather, the quote attributed to him is in reality only a portion of Rawsons' legal counsel's argument as delivered over two years following the entry of Judge Brian's Order dismissing the fraud claim. (Transcript, R. 445 at pages 23-24). It would have been impossible for Rawsons' counsel to make that same argument on a timely basis to Judge Brian because Mr. Lambrose had not been deposed until July 30, 1997, more than nine months after the entry of Judge Brian's Order.

Even if it were timely and accurate, the testimony of Mr. Lambrose proffered by counsel fails to prove or even imply the facts asserted in the Petition. Counsel argued that Mr. Lambrose had declared that he was asked only to work on the unibody and that "repairs to the crush zones and collapse zones were to be completed by someone other than his shop." (Petition at 4). Without citation to any other "evidence" in existence anywhere, Rawsons then inaccurately concluded that (1) Defendants did not hire any one else to make those repairs, and (2) they covered up the defective areas to deceive Rawsons. (Petition, *Id.*). The only evidence submitted by either party directly on this point was in the uncontroverted Affidavits of Clark and Conover - that they contracted with various repair shops for the restoration of the vehicle, without doing any substantive work on the vehicle themselves. (Affidavit of Clark ¶ ¶ 6 and 7 and Exhibit A, R.201, 206; Affidavit of Conover ¶¶ 10 and 11, R. 186). Unfortunately, Defendants are unable to demonstrate to the Court the extent of Rawsons' mis-characterization of Mr. Lambrose's

deposition testimony for the same reason that Rawsons could not cite directly to it. That deposition was never made a part of the record, in whole or part, and was never even cited by either party in any of the pleadings submitted to either trial court judge.

Rawsons' second factual witness upon whose "testimony" they now rely in asserting Judge Brian's error was Andy Anderson. Mr. Anderson did not see the vehicle until after the vehicle had been driven three months by the Rawsons and totaled in an accident which was unrelated to the alleged latent defects existent at the time of the purchase by Rawsons. (CITE). Similar to Mr. Lambrose, Mr. Anderson's testimony was unavailable at the time of the hearing on Defendant's Motion before Judge Brian, because his deposition was taken on June 3, 1997, still eight months after the entry of Judge Brian's Order. This time, a portion of Mr. Anderson's deposition was made a part of the record by Rawsons. (Memorandum, Exhibit C, R. 402-403). However, even if it had been timely submitted to Judge Brian, the citation used by Rawsons would perhaps have been more supportive of Defendants' position than that of Rawsons. According to Mr. Anderson's deposition, he was unable to discover the latent defects, which constitute the basis of Rawsons' claims against Defendants, until he completely disassembled the vehicle. The uncontroverted testimony of both Clark and Conover was that they took no such measures personally, but relied on the professional expertise of licensed car repair businesses. (Affidavits of Clark and Conover, *Id.*, R. 201, 206, 186). Defendants had no reason to know of any concealed defects, and in fact knew of none.

Even now in their Petition, Rawsons make no other effort to support their contention that the alleged defects were "known only to Defendants" or that Defendants "limited the scope of repairs" to the vehicle. (Petition at 5 and 3). Clearly, no effort was made to provide any such

evidence to Judge Brian. The Affidavits submitted in opposition to Defendant's Motion provided nothing to show any intent of any of the Defendants to mislead or defraud Rawsons. Accordingly Judge Brian correctly found that:

> 2. Plaintiffs have failed to introduce any evidence to show that Defendants undertook any of the conduct complained of by Plaintiffs "knowingly, purposefully, willfully, maliciously, or with the intent to defraud Plaintiffs."

(Order ¶2, R. 288). "The party challenging the trial court's factual findings has the heavy burden of establishing that those findings are not supported by substantial and competent evidence. *Consolidated Coal v. Division of State Lands,* 886 P.2d 514, 519 (Utah 1994). Rawsons have, in both the Appellants' Brief and the Petition, failed to carry that burden. In its affirming Decision, this Court correctly held that in their submitted affidavits Rawsons failed to assert any facts upon which a fraud claim could be maintained.

2. Judge Iwasaki properly upheld the written waivers of warranty.

Rawsons next assert that because Judge Brian erred in dismissing the fraud claim, Judge Iwasaki should have favorably considered their assertion that because the sale of the vehicle was allegedly procured by fraud, all express waivers of warranties should be ignored. Although that statement may arguably make good policy, the case which Rawsons cite in support of that declaration of law has nothing to do with either personal property or the non-enforcement of a waiver of warranty. Rather, *Ong Intern v. 11th Ave. Corp.*, 850 P.2d 447 (Utah 1993) dealt with the judicial refusal to enforce an over-broad general release of all liability in connection with a redemption of partnership rights because said rights had been procured by fraud.

Rawsons do correctly cite the Utah law generally applicable to commercial transactions of personal property, that an exclusion of warranties "is inoperative to the extent that such

construction is unreasonable." Utah Code Annotated §70-2-316(a). In subsection (3)(a) that provision of the Commercial Code goes on to say that:

> unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . .

It is beyond contention that the appropriate effective language was used repeatedly in the various instruments acknowledged and signed by Rawsons to clearly inform the Rawsons of the absence of any warranties. (R. 207- 211). Additionally, Defendants complied with the disclosure forms and warnings required by the Federal Trade Commission (16 C.F.R. §455.2) and Part 10 of the Utah Motor Vehicle Act (dealing specifically with salvage vehicles) Utah Code Annotated §§ 41-1a-1001, *et seq.*

Judge Brian found the complete absence of any evidence of fraudulent conduct or intent of Defendants and appropriately dismissed those claims. Judge Iwasaki was presented with the clear and unambiguous written waivers of warranties, each signed by Mr. Rawson. Additionally Judge Iwasaki considered the deposition testimony of Mr. Rawson:

> Q: Did you consider any verbal statement by Mr. Clark as a warranty to you concerning the vehicle?
>
> A: No.

(Deposition of James Rawson, page 42, R. 368). Conover made no verbal statements whatsoever concerning the vehicle to the Rawsons. (*Id.* at page 31-32, R. 365).

Without reconsidering Judge Brian's Order dismissing the fraud claims, Judge Iwasaki had no choice but to enforce the reasonable waivers of warranties. Similarly, this Court correctly upheld the clear and intentional waiver made by purchasers who admittedly understood the

general history of the vehicle and the inherent risks of purchasing a "salvage" vehicle. (Deposition of James Rawson, pages 13-31, R. 361-365).

3. Judge Iwasaki properly refrained from re-examining Judge Brian's Order.

Finally, Rawsons complain that Judge Iwasaki erroneously refused to reconsider the prior Order entered by Judge Brian, and reinstate the fraud claim. Certainly, as decided twice by Judge Brian, reviewed without modification by Judge Iwasaki, affirmed by this Court, and again clearly reviewed above, there was no need for Judge Iwasaki to modify or reverse Judge Brian's ruling. Nevertheless, the Utah Appellate Courts have from time to time held that Rule 54(b) of the Utah Rules of Civil Procedure provides an implied limited right of a party to seek the reconsideration of a ruling prior to the time the ruling becomes a "final judgment." *Timm v. Dewsnup,* 851 P.2d 1178, 1184 (Utah 1993). However, there is no requirement that any judge reconsider a prior decision without being petitioned to do so.

Following the entry of Judge Brian's Order and after Defendants had deposed the Rawsons concerning the extent of the alleged warranties, Defendants believed that they could submit sufficient uncontroverted evidence needed to obtain summary judgement on the remaining warranty and breach of contract claims. Accordingly, they moved the District Court for summary judgment on the remaining claims, briefed and argued the issues, and were granted the relief sought. Rawsons had that same opportunity, but they failed to make any request prior to the hearing that Judge Iwasaki reconsider Judge Brian's ruling. Neither a motion for summary judgment nor a motion to reconsider was filed by Rawsons. Even in their Memorandum opposing Defendants' Motion, Rawsons failed to request that Judge Iwasaki reconsider Judge Brian's prior ruling. (Memorandum, R. 372-388). With no prompting pleading having been filed

by Rawsons, and no opportunity afforded to Defendants to brief and argue a motion to reconsider Judge Brian's Order, Judge Iwasaki properly refrained from reconsidering or reversing the prior Order of Dismissal.

CONCLUSION

In this sixth attempt to argue the same procedural and substantive issues to a court, Rawsons have again confused the timing of their submissions of "evidence" in support of their claims. They have also utterly failed to provide any legal support for the unrealistically heavy burden they attempt to place on any owner of a motor vehicle who desires to sell. At the end of the day, Point I of Appellants' Petition is directed to the correctness of Judge Iwasaki's Order dated May 28, 1998, (1) acknowledging Judge Brian's prior Order of Dismissal, (2) dismissing the claims of breach of contract and warranty, because of legal efficacy of the express waivers of all warranties, and (3) refusing to *sua sponte* reconsider Judge Brian's Order. Based on the foregoing analysis, this Court should dismiss Rawsons' Petition for Rehearing.

Respectfully Submitted this 10 day of September, 1999.

CALLISTER NEBEKER & McCULLOUGH

By: _____

T. Richard Davis
Attorneys for Defendants-Appellees

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLEES' RESPONSE TO POINT I OF PETITION FOR REHEARING was mailed, postage prepaid, via United States mail on this 10 day of September, 1999 to the following:

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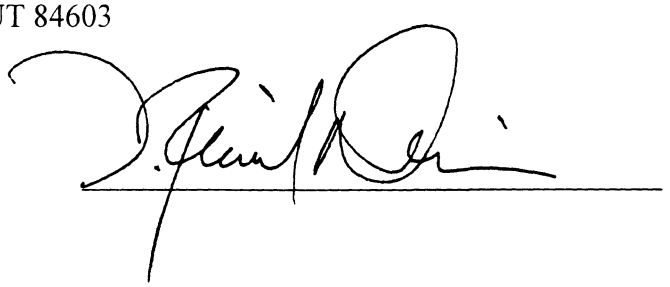

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